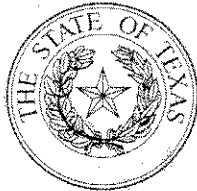


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 8, 2013

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-12-7028; TCEQ Docket No. 2012-0160-PWS-E; In Re: Executive Director of The Texas Commission On Environmental Quality v. Custom Water Co., L.L.C., Respondent**

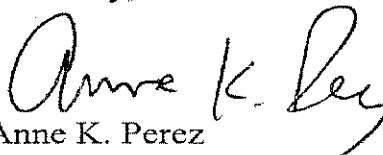
Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **April 29, 2013**. Any replies to exceptions or briefs must be filed in the same manner no later than **May 9, 2013**.

This matter has been designated **TCEQ Docket No. 2012-0160-PWS-E; SOAH Docket No. 582-12-7028**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Anne K. Perez
Administrative Law Judge

AKP::nl
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: CUSTOM WATER CO., LLC

SOAH DOCKET NUMBER: 582-12-7028

REFERRING AGENCY CASE: 2012-0160-PWS-E

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ ANNE PEREZ

REPRESENTATIVE / ADDRESS

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EXECUTIVE DIRECTOR

SOAH DOCKET NO. 582-12-7028
TCEQ DOCKET NO. 2012-0160-PWS-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY	§	
	§	
V.	§	OF
	§	
CUSTOM WATER CO., L.L.C.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS
	§	

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) Of the Texas Commission on Environmental Quality (TCEQ or Commission), seeks an administrative penalty of \$12,402 and corrective actions from Custom Water Co., L.L.C. (CWC), a public water system (PWS), for CWC's alleged violation of the Texas Health and Safety Code, a Commission rule, and a previous agreed order.

CWC concedes that it committed the violation alleged by the ED. Nonetheless, it opposes the ED's requested sanctions, particularly those involving corrective action. CWC argues that the proposed corrective actions are not necessary to protect the public health, safety, and welfare. Furthermore, the company's current financial condition renders the corrective actions cost-prohibitive. That said, CWC does not dispute that the ED's proposed penalty is calculated consistent with TCEQ's penalty policy. And, CWC offered no evidence or argument to suggest that the company was unable to pay the proposed penalty.

In this Proposal for Decision, the Administrative Law Judge (ALJ) finds that the evidence supports the ED's allegations, proposed penalty amount, and corrective actions. Therefore, the ALJ recommends that the Commission find that CWC committed the violation, assess an administrative penalty of \$12,402, and require CWC to implement the corrective actions proposed by the ED.

II. PROCEDURAL HISTORY

The preliminary hearing was set for September 13, 2012. On September 12, 2012, the ED and CWC filed a joint motion to waive appearance at the preliminary hearing and to admit certain jurisdictional documents. The joint motion was granted and the documents were admitted without objection. Jurisdiction was established, and the parties' proposed procedural schedule was adopted. Other undisputed procedural facts are set out in the Findings of Fact in the attached Proposed Order.

ALJ Anne K. Perez convened the hearing on the merits on February 7, 2013, at the State Office of Administrative Hearings in Austin, Texas. Staff attorneys Peipey Tang and Rudy Calderon represented the ED, and attorney John Stephen Fenoglio represented CWC. The record closed on February 7, 2013.

III. DISCUSSION

A. Overview

CWC owns and operates a water system located at 146 Alamo Road in Montague, Montague County, Texas (Facility). The Facility provides water for human consumption, has approximately 171 service connections, and serves at least 25 people per day for at least 60 days per year. As such, the Facility is a PWS.

On December 10, 2008, the Commission entered an Agreed Order in Docket No. 2008-0417-PWS-E (Agreed Order), under which CWC was required to pay an administrative penalty and take corrective actions. At issue in this proceeding is Ordering Provision No. 2.e.ii. in the Agreed Order, requiring that within 90 days of the order's effective date,¹ CWC replace the Facility's six existing ground-storage tanks with ground-storage tanks that meet AWWA standards, in accordance with Texas Administrative Code title 30, § 290.43(c).

¹ The Agreed Order was effective on December 10, 2008. As a result, CWC was required to replace the tanks on or before March 10, 2009. See ED Exs. 1-4.

On November 9, 2011, a TCEQ investigator concluded that CWC violated the Commission rule and Agreed Order Provision No. 2.e.ii., by failing to replace the Facility's ground storage tanks as required. At the hearing on the merits, CWC admitted that it had committed the violations.

B. Applicable Law

A PWS is a system that provides water for human consumption through pipes or other constructed conveyances and serves at least 25 individuals at least 60 days out of the year.² Because the Facility is a PWS, CWC is subject to the Commission's enforcement authority pursuant to Texas Health and Safety Code § 341.049.

The Commission is authorized to adopt and enforce rules to implement the federal Safe Drinking Water Act.³ It is TCEQ's responsibility to ensure that public water supplies conform to Texas Health and Safety Code § 341.031's requirements. To that end, the Commission rules provide technical standards and operating practices applicable to PWSs, state-wide.⁴

Texas Administrative Code title 30, § 290.43(c) establishes criteria for water storage receptacles used by PWSs. The rule applies to the "[d]esign and construction of clearwells, standpipes, ground storage tanks, and elevated tanks,"⁵ and requires that "[a]ll facilities for potable water storage . . . be covered and designed, fabricated, erected, tested, and disinfected in strict accordance with current American Water Works Association (AWWA) standards."⁶ Various subparts of the rule detail cleaning and maintenance requirements for water storage tanks, while others contain technical and design criteria for special-purpose items, including roof vents and openings, screens, overflows, liquid level indicators, inlet and outlet connections, and access manways.⁷

² 30 Tex. Admin. Code § 290.38(66).

³ Tex. Health & Safety Code § 341.031(a).

⁴ See 30 Tex. Admin. Code ch. 290, subch. D ("Rules and Regulations for Public Water Systems").

⁵ *Id.*

⁶ *Id.*

⁷ 30 Tex. Admin. Code § 290.43(c)(1)-(10).

The Commission rule for water storage receptacles used by PWSs, while strict, is subject to subchapter D's general provisions. The general rule emphasizes the Commission's primary goal of safeguarding public drinking water supplies from contamination, and permits exceptions "to one or more of the requirements in this subchapter."⁸ Requests for exception are considered on an individual basis; a PWS "must demonstrate to the satisfaction of the ED that the exception will not compromise the public health or result in a degradation of service or water quality."⁹

C. Executive Director's Evidence

The ED introduced documentary evidence and called two witnesses: Jenelle Crane and Epifanio Villarreal.

Jennelle Crane: Ms. Crane is an environmental investigator for the TCEQ Abilene region. She holds a B.A. degree in biology and chemistry, and a master's degree in environmental management. She has worked for the Commission for six years and primarily investigates PWSs for compliance with the agency's rules. She investigated the Facility pursuant to the Commission's policies and procedures, and she prepared a report on her findings.¹⁰

Ms. Crane conducted both the current and the most recent prior investigation of the Facility that resulted in the 2008 Agreed Order, but not the initial investigation in 2004. She characterized her activities in November 2011 as a "follow-up" investigation, to determine CWC's compliance with the Agreed Order. The Agreed Order was executed by Edward Fegnolio, CWC's president and owner-operator, on July 27, 2008.¹¹

⁸ 30 Tex. Admin. Code § 290.39(l).

⁹ *Id.* Other requirements and restrictions for subchapter D exceptions include: (1) the request must be in writing and validated by thoroughly documented data, and precede the PWS's submission of engineering plans and specifications for a proposed project for which an exception is being requested; (2) any exception granted by the Commission is subject to revocation; (3) any request for exception not approved by the Commission in writing is denied; and (4) the ED may establish site specific design, operation, maintenance, and reporting requirements for a PWS that has been issued an exception.

¹⁰ ED Ex. 3 at 1-3.

¹¹ ED Ex. 3 at 10-16. Edward Fenoglio (Mr. Fegnolio or "owner-operator") and John Stephen Fenoglio (CWC's attorney of record) are brothers.

Ms. Crane testified that while inspecting the Facility on November 9, 2011, she observed that Mr. Fegnolio had not performed the technical corrective actions listed in the Agreed Order, Ordering Provision No. 2.e.ii. Specifically, the ordering provision required that, no later March 10, 2009, CWC replace the Facility's six existing ground-storage tanks with ground-storage tanks that met AWWA standards, in accordance with Texas Administrative Code title 290, § 290.43(c).

Based on her November 9, 2011 inspection findings, Ms. Crane concluded that CWC's failure to replace the Facility's ground-storage tanks violated the Commission rule and Agreed Order, Ordering Provision No. 2.e.ii. She documented the violation in an enforcement action referral for CWC, dated January 5, 2012.¹² On the same date, she sent a Notice of Enforcement to CWC's owner-operator, informing him of the alleged violations, the applicable rule requirements, and the initiation of formal enforcement action against CWC.¹³

On cross-examination, Ms. Crane was asked about her prior investigation. She stated that in 2008, Mr. Fenoglio was present when she inspected the Facility's operations. At the end, she provided him with a list of current AWWA standards for ground-storage tanks, the technical specifications and design criteria of each standard, and the corresponding deficiencies revealed in the inspection of CWC's existing ground-storage tanks. Ms. Crane recalled one such inadequacy from the 2008 investigation: in the lower ring or section of all six existing tanks, the primary access manway was inadequate in width (less than 30 inches in diameter).¹⁴ According to Ms. Crane, a 30-inch (versus a 24-inch) manhole in this location is necessary to protect the public health, safety, and welfare, because the wider opening: (1) ensures full access to the bottom of the tank for required maintenance, thereby increasing the likelihood that potential contaminants (silt and other deposits) will be removed from the public water supply; and (2) promotes operator safety, *i.e.*, the wider opening reduces the likelihood that someone could be trapped inside the tank.

Ms. Crane admitted she was aware that some of CWC's existing ground-storage tanks were installed prior to 2004, the first year that TCEQ investigated the Facility's operations, but has no

¹² ED Ex. 3 at 7-9.

¹³ ED Ex. 3 at 5-6.

¹⁴ See 30 Tex. Admin. Code § 290.43(c)(10).

knowledge of pre-2004 regulatory standards for ground-water-storage receptacles. She was likewise unaware whether ground-storage tanks installed by CWC prior to 2004 were approved for use in a PWS by the regulating agency preceding TCEQ.

Ms. Crane acknowledged that she lacked the expertise to determine how, or if a particular nonconformity with AWWA standards would impact the overall integrity of an in-ground tank used for water storage. However, she testified that she attempted to make this determination in 2008 by requesting that Mr. Fegnolio provide the plans, specifications, and related documents for CWC's six existing ground-storage tanks. According to Ms. Crane, other TCEQ staff members with the necessary technical expertise were available to review such documents; and could have determined the structural adequacy of CWC's existing tanks by evaluating the technical requirements and design criteria used to in their construction. However, CWC's owner-operator did not provide the requested information in 2008 and instead executed the Agreed Order under which he agreed to replace the existing tanks with tanks that met AWWA standards.

Epifanio Villarreal: Mr. Villarreal has worked as a TCEQ enforcement coordinator for seven years. He works primarily on PWS cases, and he calculated the penalty and processed the enforcement order for this case. Based on TCEQ's penalty policy¹⁵ and Commission rules, he used the agency's penalty calculation worksheet¹⁶ to determine that a \$12,402 penalty was appropriate.

C. Respondent's Evidence

Respondent offered documentary evidence and the testimony of two witnesses: Kerry D. Maroney, Sr., P.E. and Edward Fegnolio.

Kerry D. Maroney, Sr.: Mr. Maroney is the president of Biggs & Matthews, Inc., consulting engineers located in Wichita Falls, Texas. His 36-year career in the field of civil engineering includes project management and consulting for large and small clients. He qualifies as an expert in planning, permitting, and designing water treatment facilities, water treatment systems, and water

¹⁵ ED Ex. 5.

¹⁶ ED Ex. 4.

transmission and distribution systems. He also reviews, designs and provides consultation services for the operation of new water supply wells.

Mr. Maroney testified that he has provided consultation services for CWC for several years. He said that CWC's water system uses groundwater pumped by water supply wells. After the groundwater is pumped, it must be treated with disinfectants in CWC's treatment facility before it is safe for the public to drink. He stated that CWC's public water supply is stored in six ground-storage tanks. In Mr. Maroney's opinion, CWC has the capability to provide the public with a continuous and adequate supply of safe drinking water. CWC currently holds a Certificate of Convenience and Necessity (CCN).

Mr. Maroney has evaluated tanks used for water storage that do not meet AWWA standards. On November 30, 2012, he inspected CWC's six existing ground storage tanks. In correspondence sent to TCEQ on December 3, 2012, he reported that "none of [CWC's] six existing tanks meet all the requirements set forth in AWWA Standards for ground storage tank construction. However, they continue to provide adequate service for the system."¹⁷ At the same time, he requested, on CWC's behalf, that the Commission "waive AWWA Construction Standards . . . for these six operational tanks, until such a time that the next major renovation work is required and the tank improvements/modifications can be completed at that time."¹⁸ TCEQ has not responded to CWC's December 3, 2012, request for variance. Mr. Maroney stated that if CWC is required to immediately remove all six of its existing ground-storage tanks and replace them with six tanks that meet AWWA standards, CWC's expenses would total approximately \$200,000 in equipment, labor, and professional fees.

Mr. Maroney testified that he completed the design for a new water supply well to serve CWC's water system. On June 13, 2012, CWC received approval from TCEQ to construct the new well at CWC's existing Pump Station No. 1 site located in Montague, Texas.¹⁹ It is his understanding that CWC's water system was previously served by two on-site water supply wells,

¹⁷ Res. Ex. 2 at 11-13.

¹⁸ *Id.*

¹⁹ *Id.* at 4-7.

one of which failed in the summer of 2012. Mr. Maroney understands that CWC's remaining operational well is pumping approximately 26 gallons of water per minute and, based on TCEQ's minimum requirements, CWC "absolutely needs this new well" to maintain the required water supply to provide existing customers with continuous and adequate service. He estimated that the expense of constructing the new water supply well, inclusive of professional fees, labor, and equipment, will cost CWC approximately \$225,000.²⁰

Edward Fegnolio: Mr. Fegnolio testified that he has owned and operated the Facility since 1982. He operates several other small water systems as well.

Mr. Fegnolio stated that four of CWC's six ground-storage tanks were installed in 1982, when public water supplies were regulated by the Department of Health Services (DHS). According to Mr. Fegnolio, he purchased the tanks in 1982 with the blessing of DHS investigator Bob Harrison. The other two tanks were purchased in 1988 or 1990 and were also approved by DHS.

Mr. Fegnolio testified that there are no problems with the integrity of CWC's existing ground storage tanks. Other than painting and the installation of wider manways at the top of each tank, no major repairs have been required or performed by CWC.

According to Mr. Fegnolio, CWC has never made a profit. He noted that the company suffered operating losses of \$5,414.98 for the quarterly period ending on March 31, 2012; \$57,113 for the year ending December 31, 2011; \$102,900 for the year ending December 31, 2010; \$16,496 for the year ending December 31, 2009; and \$76,873 for the year ending December 31, 2008.²¹ Last year, CWC instituted a rate increase, its first one since 1988 or 1989.

Building the new water supply well is an essential requirement for CWC, but the company does not have the necessary cash flow to pay for it. Mr. Fegnoli testified that on January 16, 2013, he executed a promissory note with Legend Bank, N.A. (Bank), promising to repay the Bank \$92,000

²⁰ *Id.* at 16.

²¹ Res. Ex. 5.

at 5.25 percent interest over a 66-month period.²² As of December 17, 2012, CWC's total debt was \$37,999.76.²³ Mr. Fegnoli testified that he draws no salary from CWC, but the company pays his expenses ranging between \$800 and \$1,200 per month. He testified that the company cannot afford to implement corrective actions that will cost \$200,000.²⁴

On cross-examination, Mr. Fegnoli admitted that when he signed the Agreed Order in 2008, he was aware that he would be unable to comply with the required terms.

D. ALJ's Analysis and Recommendation

The evidence established that CWC is qualified as a PWS under Texas Administrative Code title 30, § 290.38(66). As a PWS, CWC is subject to the Commission's enforcement authority pursuant to Texas Health and Safety Code § 341.049. The Commission is authorized to adopt and enforce rules to implement the federal Safe Drinking Water Act.²⁵ And, TCEQ must ensure that public water supplies conform to Texas Health and Safety Code, § 341.031's requirements. The Commission rules set out the technical standards and operating practices required for PWSs. Texas Administrative Code title 30, § 290.43(c) requires that ground storage tanks be designed and constructed in strict accordance with current AWWA standards.

The evidence established that CWC has been in violation of Texas Administrative Code title 30, § 290.43(c) since 2004. In December 2008, Mr. Fegnoli signed the Agreed Order, wherein Ordering Provision No. 2.e.ii. required CWC to replace its existing ground storage tanks with tanks that met AWWA standards. The follow-up investigation in November 2011 revealed the same violation. In other words, two and one-half years later CWC's violation of the Commission rule remained outstanding.

²² Res. Ex. 6.

²³ Res. Ex. 7.

²⁴ Staff presented brief rebuttal testimony on this issue. Paige Seidenberger, a TCEQ financial analyst for 12 years, disagreed with Mr. Maroney's opinion. She testified that the cost of the corrective actions sought by the ED in this case is far less than \$200,000.

²⁵ Tex. Health & Safety Code § 341.031(a).

At the hearing on the merits, Mr. Fegnolio admitted that CWC had committed the violation. He testified that at the time he signed the Agreed Order, he was aware that CWC would not come into compliance. He intentionally violated the Commission rule and the Agreed Order, Ordering Provision No. 2.e.ii. Although CWC engaged Mr. Maroney to inspect the existing tanks and offer expert testimony regarding their structural integrity, CWC has yet to provide TCEQ with the plans and specifications for the existing tanks.

Based on CWC's stipulation that it failed to comply with the Commission's rule and the Agreed Order it signed in 2008, the ALJ concludes that CWC violated Texas Health and Safety Code § 341.0315(c), 30 Texas Administrative Code § 290.43(c), and Ordering Provision No. 2.e.ii. in the Agreed Order adopted in TCEQ Docket No. 2008-0417-PWS-E. The ALJ further concludes that CWC should be assessed \$12,402 in penalties for the violations, and be required to take the proposed corrective actions recommended by the ED.

IV. SUMMARY

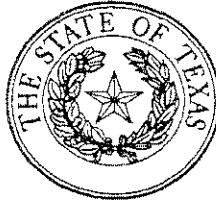
The ALJ recommends that the Commission adopt the attached proposed order, assess CWC a \$12,402 administrative penalty for the violation discussed above, and order CWC to take the corrective actions proposed by the ED.

SIGNED April 8, 2013.



ANNE K. PEREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties
And Requiring Corrective Action
By Custom Water Co., L.L.C.,
SOAH DOCKET NO. 582-12-7028
TCEQ DOCKET NO. 2012-0160-PWS-E**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Custom Water Co., L.L.C. (CWC). A Proposal for Decision (PFD) was presented by Anne K. Perez, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Jurisdiction

1. CWC owns and operates a public water system (PWS) located at 146 Alamo Road in Montague, Montague County, Texas (Facility).
2. The Facility has approximately 171 service connections and serves at least 25 people per day for at least 60 days per year and provides water for human consumption.

3. During an investigation conducted on November 9, 2011, Jenelle Crane, a TCEQ Abilene Regional Office investigator, concluded that CWC violated Texas Administrative Code title 30, § 290.43(c) and TCEQ Agreed Order Docket No. 2008-0417-PWS-E, Ordering Provision No. 2.e.ii., by failing to replace the ground -storage tanks at the Facility with ground-storage tanks that meet current American Water Works Association (AWWA) standards.
4. On January 10, 2012, CWC received notice of the alleged violation and the initiation of formal enforcement action by TCEQ's Executive Director (ED).
5. On March 20, 2012, the ED filed the Preliminary Report and Petition (EDPRP) with the Commission's Chief Clerk, alleging that CWC violated TCEQ Agreed Order Docket No. 2008-0417-PWS-E (Agreed Order), Ordering Provision No. 2.e.ii. and Texas Administrative Code title 30, § 290.43(c)(8), requiring that ground storage tanks be painted, disinfected, and maintained in strict accordance with current AWWA standards.
6. The EDPRP recommended that the Commission enter an order assessing administrative penalties of \$12,402 against CWC for the alleged violations and requiring CWC to take certain corrective actions.
7. The EDPRP's reference to Texas Administrative Code title 30, § 290.43(c)(8), is incorrect. Because the ED concluded that CWC failed to replace the Facility's ground storage tanks with storage tanks that meet current AWWA standards, the EDPRP should have alleged a violation of Texas Administrative Code title 30, § 290.43(c).
8. On March 20, 2012, the ED mailed the EDPRP to Edward Fenoglio, CWC's President and the Facility's owner-operator, by certified mail return receipt requested and by first class mail postage prepaid.
9. On May 4, 2012, CWC filed an answer to the EDPRP requesting a hearing.
10. On July 3, 2012, the Commission's Chief Clerk referred this case to SOAH for hearing.
11. On August 13, 2012, the Commission's Chief Clerk mailed notice of a preliminary hearing to CWC that was scheduled for September 13, 2012. The notice of hearing:
 - a. indicated the time, date, place, and nature of the hearing;
 - b. stated the legal authority and jurisdiction for the hearing;
 - c. indicated the statutes and rules the ED alleged CWC violated;
 - d. referred to the EDPRP, a copy of which was attached, which described the matters asserted by the ED; and
 - e. included a copy of the ED's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violation.

12. On September 12, 2012, the ED filed an agreed motion to waive the preliminary hearing, admit exhibits that proved jurisdiction, set a case schedule on which the parties had agreed, and hold a hearing on the merits of the case on February 7, 2013. The motion was granted by written order, which was faxed to each party on September 14, 2012.
13. On January 8, 2013, the ED corrected the error in the EDPRP by filing the First Amended Report and Petition (EDFARP) with the Commission's Chief Clerk. The EDFARP alleged that CWC violated Texas Administrative Code title 30, § 290.43(c) and Agreed Order, Ordering Provision No. 2.e.ii., by failing to replace the ground-storage tanks at the Facility with ground-storage tanks that meet current AWWA standards.
14. The EDFARP proposed sanctions identical to those suggested in the EDPRP. The EDFARP recommended that the Commission enter an order assessing administrative penalties of \$12,402 against CWC for the alleged violations and requiring CWC to take certain corrective actions, including those set out below in this Order.
15. The EDFARP included a copy of the ED's penalty calculation worksheet, which was identical to the penalty calculation worksheet that accompanied the EDPRP.
16. On January 8, 2013, the EDFARP was mailed by certified mail return receipt requested and by first class mail postage prepaid to:
 - a. Edward Fenoglio, CWC's corporate principal and owner-operator, 146 Alamo Road, Montague, Texas 76251; and
 - b. John Stephen Fenoglio, Attorney for CWC, 713 W. 14th St., Austin, Texas 78701.
17. On February 7, 2013, the ALJ convened the hearing on the merits as indicated in the previously issued order. The hearing was concluded and the record was closed on that same date.
18. The ED appeared at the hearing through his attorneys of record, Peipey Tang and Rudy Calderon.
19. CWC appeared at the hearing and was represented by attorney John Stephen Fenoglio.

The Violation

20. CWC does not dispute that it violated Texas Administrative Code title 30, § 290.43(c); Agreed Order, Ordering Provision No. 2.e.ii.; and Texas Health and Safety Code § 341.0315(c).

Penalties

21. CWC has never had an outage or even a customer complaint due to the alleged violations.
22. In the EDFARP, the ED proposed a total of \$12,402 in penalties for CWC's alleged violations.
23. The Commission has adopted a Penalty Policy, effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
24. The ED used the Commission's September 2002 penalty policy to calculate the penalties proposed in this case.
25. Because it has less than 1,100 connections, the Penalty Policy treats CWC as a minor source.
26. Before certain adjustments, the base penalty under the Penalty Policy would total \$1,000 for the violations alleged in this case.
 - a. The violation of Texas Administrative Code title 30, § 290.45(c) did not cause actual harm to the environment or human health.
 - b. The violations presented a risk of moderate potential harm because the use of ground-storage tanks that do not meet AWWA standards could compromise the sanitary nature of the drinking water, exposing CWC's customers to significant amounts of contaminants that would not exceed levels protective of human health. Under the Penalty Policy, the base penalty of \$1,000 would be reduced to 10%, or \$100.
 - c. The violations continued for at least 1,119 days, from the date of the Agreed Order until January 13, 2012, when the ED screened this case for formal enforcement action.
 - d. Under the Penalty Policy, the number of violation events for a continuing violation that poses a risk of moderate potential harm is calculated by dividing the duration of the violation (1,119 days) by a quarterly period (90 days), thus CWC had 13 violation events.
 - e. Because CWC's continuing violations involved six ground storage tanks with 13 events per tank, CWC had 78 quarterly violation events between the effective date of the Agreed Order and the date that the case was screened for formal enforcement action.
 - f. The application of 78 quarterly violation events to the adjusted base penalty of \$100, results in a \$7,800 base penalty for the violation.

- g. Because the economic benefit that CWC gained by failing to comply with the Commission rule and Agreed Order, Ordering Provision No. 2.e.ii., was less than \$15,000, no adjustment was made to the base penalty for economic benefit.

- 27. Under the Penalty Policy, the \$7,800 base penalty was adjusted upward by 59 percent, or \$4,602, due to CWC's compliance history, which included a prior agreed order; a default order; two notices of violation with the same or similar violations alleged in the current enforcement action; and two notices of violation involving violations dissimilar to the violation alleged in the current enforcement action.
- 28. The \$4,602 enhancement for CWC's compliance history, when applied to the total base penalty of \$7,800, results in a final penalty amount of \$12,402. This amount was not adjusted for culpability, good faith effort to comply, or other factors that justice may require.

Corrective Actions

- 29. In the EDFARP, the ED proposed two corrective actions, which are set out below in this Order.

II. CONCLUSIONS OF LAW

- 1. The Commission has jurisdiction over this matter pursuant to Texas Water Code § 5.013 and Texas Health and Safety Code § 341.049.
- 2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Texas Government Code chapter 2003.
- 3. Under Texas Health and Safety Code § 341.049, the Commission may assess an administrative penalty against any person who violates chapter 341, subchapter C of the Texas Health and Safety Code, or of any rule or order adopted or issued thereunder.
- 4. Under Texas Health and Safety Code § 341.049, the penalty may not exceed \$1,000 per violation, and each day of a continuing violation may be considered a separate violation.
- 5. As required by Texas Health and Safety Code § 341.049 and Texas Administrative Code title 30, §§ 1.11 and 70.104, CWC was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.
- 6. As required by Texas Government Code §§ 2001.051 and 2001.052; Texas Health and Safety Code § 341.049; Texas Administrative Code title 1, §§ 155.401 and 155.501; and

Texas Administrative Code title 30, §§ 1.11 and 39.25, CWC was notified of the hearing on the alleged violations, the proposed penalties, and the proposed corrective actions.

7. Texas Administrative Code title 30, § 290.38(66) defines “public water system” as a system for providing the public water for human consumption through pipes or other conveyances. The system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year.
8. CWC’s system qualifies as a PWS under the definition at 30 TAC § 290.38(66).
9. Texas Health and Safety Code § 341.031 authorizes the Commission to adopt and enforce rules to implement the federal Safe Drinking Water Act.
10. Texas Health and Safety Code § 341.0315(c) requires the Commission to ensure public drinking water systems supply adequate amounts of safe drinking that meet the requirements of Commission rules.
11. Based on the above Findings of Fact, CWC violated Texas Administrative Code title 30, § 290.43(c), as in effect on the date of the inspection; Agreed Order, Ordering Provision No. 2.e.ii.; and Texas Health and Safety Code § 341.0315(c).
12. In determining the amount of an administrative penalty, Texas Health and Safety Code § 341.049(b) requires the Commission to consider several factors including:
 - a. the nature, circumstances, extent, duration, and gravity of the prohibited act;
 - b. the history and extent of previous violations by the violator;
 - c. the violator’s degree of culpability, good faith, and economic benefit gained through the violation;
 - d. the amount necessary to deter future violations; and
 - e. any other matters that justice may require.
13. Based on consideration of the above Findings of Fact, the factors set out in Texas Health and Safety Code § 341.049(b), and the Commission’s Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$12,402 is justified and should be assessed against CWC.
14. Based on the above Findings of Fact and Conclusions of Law, CWC should be required to take the corrective action measures set out below in this Order.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Custom Water Co., L.L.C. (Respondent) is assessed an administrative penalty of \$12,402 for its violation of Texas Health and Safety Code § 341.0315(c), Texas Administrative Code title 30, § 290.43(c), and Agreed Order, Ordering Provision No. 2.e.ii. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Custom Water Co., L.L.C., Docket No. 2012-0160-PWS-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 180 days after the effective date of this Commission Order, Respondent shall replace the ground storage tanks with tanks that meet current AWWA standards.
3. Within 195 days after the effective date of this Commission Order, Respondent shall submit written certifications as described below, and include detailed supporting documentation such as photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

The certification shall be sent to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

with a copy to:

Water Section Manager
Abilene Regional Office
Texas Commission on Environmental Quality
1977 Industrial Boulevard
Abilene, Texas 79602

4. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by Texas Government Code § 2001.144 and Texas Administrative Code title 30, § 80.273.
8. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Chairman
For the Commission